No. 88-266

In The

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

JAN GRAHAM, *et al., Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE OKLAHOMA TAX COMMISSION

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in determining that removal jurisdiction was proper for an action brought against an Indian tribe in state court?

2. Does tribal sovereign immunity prohibit an action brought by the State to enforce the collection and remittance requirements of its tax laws on commercial activities conducted by an Indian tribe on off-reservation lands?

LIST OF PARTIES

The Petitioner is the State of Oklahoma, ex rel., Oklahoma Tax Commission.

The Respondents are Jan Graham and the Chickasaw Nation.

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BRIEF FOR THE OKLAHOMA TAX COMMISSION

OPINIONS BELOW

The Order and judgment of the Court of Appeals entered on May 18, 1988, is reported at 846 F.2d 1258. The Order of the Court of Appeals entered on June 26, 1987, is reported at 822 F.2d 951, vacated by this Court at 108 S.Ct. 481 on December 7, 1987 (Case No. 87-635). The Orders of the United States District Court for the Eastern District of Oklahoma entered on February 27th, 1986 are unreported. All of these Orders are contained in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Order of the Court of Appeals was entered on May 18, 1988 and the Petition for writ of certiorari was filed on August 5, 1988 and docketed in this Court on August 12, 1988. The Petition was granted on October 3, 1988.

STATUTES INVOLVED

Title 28 United States Code §1441(a) and (b) provides for removal jurisdiction in federal courts. Title 25 United States Code §§465 and 501 provides authority for the Federal Government to hold title to land in trust for Indian Tribes.

Title 68 Oklahoma Statutes §§301 and 1354 levy the State's cigarette and sales taxes respectively and §232 of Title 68 provides for injunction proceedings for violation of State tax laws. All of these statutes are reproduced in the Appendix to the Petition.

STATEMENT OF THE CASE

1. Nature of the Controversy.

The Chickasaw Nation (Tribe) conducts high stakes bingo games and sells cigarettes at a motel within the city limits of Sulphur, Oklahoma. The motel was purchased by the Chickasaw Nation from the Small Business Administration in 1972. The premises were conveyed to the United States of America in trust for the Tribe in August 1985 pursuant to the provisions of 25 U.S.C. §501 and 25 U.S.C. §465, see deeds at JA 14 and 16.

Oklahoma law requires vendors to collect and remit sales tax on bingo sales and cigarettes as well as on other items. 68 Okla. Stat. §1354. In addition, cigarette excise taxes are imposed on the consumer/user of cigarettes. 68 Okla. Stat. §§302, 302-1(a), 302-2(a) and 302-3(a). Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor and affixed to each package of cigarettes sold. 68 Okla. Stat. §302. Failure of a vendor to collect and remit state sales tax or to affix cigarette excise tax stamps to packages of cigarettes is grounds for seeking injunctive relief. 68 Okla. Stat. §232.

The Chickasaw Nation has neither collected and remitted state sales tax from its customers nor purchased and affixed state cigarette excise tax stamps to the packages of cigarettes sold.

2. The Proceedings Below.

On October 18, 1985, the Oklahoma Tax Commission (State) filed the present action in the State District Court of Murray County, Oklahoma, seeking to enjoin the Tribe pursuant to 68 O.S.A. §232 from further operating its business within the State until the Tribe complied with State tax laws, all as appears in the State's Petition in the State District Court, J.A. 3.

On October 22, 1985, the Tribe filed its Petition for removal of the case in the United States District Court for the Eastern District of Oklahoma under authority of 28 U.S.C. §1441, J.A. 1. Thereafter, the State filed its motion to remand on October 30, 1985, J.A. 8, and the Tribe motioned to dismiss on November 27, 1985, J.A. 9. The District Court ruled on these motions in Orders entered on February 27, 1986, denying the State's motion to remand, pet. for cert. page A-25 (Appendix D), and granting the Tribe's motion to dismiss, pet. for cert. page A-27 (Appendix E).

The District Court, in denying the State's motion to remand, relied on *Montana v. Blackfeet Tribe of Indians*, 471 U.S.759 (1985) and found that an action to enforce state revenue statutes against activities of a federally recognized Indian tribe raised a federal question giving the court removal jurisdiction. The District Court then granted the motion to dismiss filed by Jan Graham and the Chickasaw Nation on the grounds of tribal sovereign immunity from unconsented suit without addressing the status of the land on which the commercial activities occurred. The State's motion for reconsideration was subsequently denied by the District Court, Pet. for Cert. page A-31 (Appendix F), and the State appealed.

On appeal the Tenth Circuit affirmed the lower decisions finding "that removal was proper because of the constitutional grant of federal jurisdiction over Indian affairs," (Pet. for Cert., Page A-14) and applying reservation case law to this off-reservation situation, held that tribal sovereign immunity barred this action against both Jan Graham and the Chickasaw Nation. Pages A-15 to A-16.

The Oklahoma Tax Commission then petitioned this Court for writ of certiorari to issue in order to review the decision of the

Appeals Court. The Commission's petition was granted on December 7, 1987, and the judgment of the Appeals Court was vacated. The case was then remanded back to the Tenth Circuit for further consideration in light of *Caterpillar, Inc. v. Williams*, 482 U.S.___, 107 S.Ct. 2425 (1987).

On remand, the Tenth Circuit reasserted its previous opinion holding that removal jurisdiction was proper and the opinion in *Caterpillar* was inapposite to this case, Pet. for Cert. Page A-2. The Tenth Circuit also reaffirmed its holding that the Tax Commission's suit was barred by tribal sovereign immunity.

SUMMARY OF ARGUMENT

The original pleading filed by the State in the District Court of Murray County alleged that a business operating within the State of Oklahoma had made taxable sales upon which no tax was collected and remitted, nor any reports filed, as required by State law. This pleading contained all of the proper allegations necessary for the enforcement of State tax law by injunction.

The lower courts extinguished the jurisdiction of the State Court by denying the States motion to remand on the grounds that an Indian tribe was a party to the suit and thus a federal question was inherent in the pleading. Although the claim did not rely on federal law, the lower courts opined that the claim was an attempt to avoid the sovereign suit immunity of the Tribe and could not be properly plead without alleging that the Tribe's affirmative defense had been waived.

The lower courts used this immunity defense as the basis for federal removal jurisdiction. The State's first argument is a simple one. Removal jurisdiction is improper in this case because Congress has long since decided that federal defenses do not provide a basis for removal, *Catepillar, Inc. v. Williams*, 107 S.Ct. 2425.

After refusing to remand the case to state court, the federal courts dismissed the action grounded on the Tribe's sovereign immunity from suit. The State urges that the lower court's opinions are in conflict with the opinions of this Court which hold that the

Tribes in Oklahoma are not separate political entities with all the rights of independent status and are not exempt from laws applying alike to all state citizens, *Oklahoma Tax Commission v. United States*, 319 U.S. 598. The Indian sovereignty doctrine is not rigidly applied to cases like Oklahoma where Indians have left the reservation and become assimilated into the general community, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164. And, state authority over Indians is yet more extensive over activities not on any reserrvation, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145. In short, Tribal sovereignty is not a bar to state jurisdiction, although states must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption.

Finally, the State argues that federal statutes which are used to allocate federal, tribal and state jurisdiction within Indian country, namely 18 U.S.C. §1151 and 28 U.S.C. §1360, cannot be used by the Tribe to escape the taxing jurisdiction of the State because such an application would be violative of the principles of federalism embodied in the Tenth Amendment. Such a construction of federal law would substantially curtail the exercise of the State's taxing power within Oklahoma and impair the State's ability to function effectively in a federal system.

I. THE CASE AT BAR WAS IMPROPERLY REMOVED FROM THE STATE DISTRICT COURT.

In this case, the Oklahoma Tax Commission seeks to enforce its sales tax and cigarette tax laws against the Tribe's business enterprise. The Petition filed in State District Court by the Tax Commission, JA 3, alleges that State laws are being violated and prays for the remedy provide by State law for those violations. The face of the State's Petition is absolutely void of any reliance on federal law, which is logical in view of the fact that federal law provides no remedy for the collection of a state's taxes. Since the only remedy available to the Tax Commission is provided by State law, this action could not have been originally brought in the Federal District Court.

The Tribe's removal petition, JA 1, is allegedly grounded on

federal question jurisdiction under 28 U.S.C. §1441(a) in that the named defendant, Chickasaw Nation, is a federally recognized Indian Tribe. However, the Tribe's removal petition points to no claim within the State's original pleading which is founded upon the Constitution, treaties or laws of the United States. The Tenth Circuit so found in its opinion, Pet. Cert. A-3, that the State's complaint facially states a claim grounded on State law. Nothing in the pleading even suggests implication of a federal question, yet the lower court found that such a question is inherent within the complaint because of the parties subject to the action. No authority is cited for the Appellate Court's holding that a complaint need not rely on federal law to invoke the jurisdiction of the federal court as long as a federal question is inherent in the pleading.

However, the Appeals Court attempts to justify this holding by coupling the removal question with the Tribe's affirmative defense of sovereign suit immunity. It is upon this defense that the Tenth Circuit predicated removal jurisdiction by reasoning that the State was required to somehow anticipate this defense and overcome it in the original pleading. The State's failure to address this defense rendered the petition "not well plead" in the opinion of the Tenth Circuit and the Tribe was allowed to inject the defense as a jurisdiction basis for removal.

Whether the defense of soveriegn suit immunity is a valid defense to the State's action is discussed in the following argument. But the separate issue of federal court removal jurisdiction is governed by rules which do not permit this case to be removed from the state to the federal court. These rules were explained in this Court's opinion in *Caterpillar, Inc. v. Williams*, supra, which held that only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal question jurisdiction is governed by the "well pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

To bring a case within federal court jurisdiction, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another, *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936) at 112. In the present case, the immunity upon which federal jurisdiction is said to rest is not the basis of the State's suit because if the Tribe's claimed immunity is struck down, the State will still have to prove that taxes are owed, tax law was violated and an injunction should issue in order to vindicate the State's right to have its taxes collected. If the immunity is upheld, then the Tribe avoids liability for the tax at the outset, but the immunity created by federal law is the basis of the defendant's defense rather than the basis of the palintiff's claim. As to the enforcement of State tax law, aside from the affirmative defense, the original petition in State District Court properly alleges a cause of action.

Also, a genuine and present controversy, not merely a possible or conjectural one, must exist with reference to federal law and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or repies to a probable defense, *Gully*. On this point, the Court in *Gully* ruled:

> The federal nature of the right to be established is decisive - not the source of the authority to establish it. Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law, we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because it is prohibited thereby.

Looking upon the face of the original petition - an action by the Tax Commission to enforce its tax levy under the Oklahoma Sales Tax Code and the Oklahoma Cigarette Stamp Tax Act - a straight-forward application of the well-pleaded complaint rule precludes

original federal court jurisdiction. Oklahoma law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if the Tax Commission hs made out a valid claim for relief under state law. The well-pleaded complaint rule was framed to deal with precisely such a situation. Since 1887, it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) at 13.

In spite of these rules limiting removal jurisdiction, the Tribe contends that a federal question exists in this lawsuit because the defendant is an Indian Tribe and the Federal Government has completely pre-empted the field of "Indian law" so that any kind of suit involving the Tribe is a federal matter. The authority of this Court is opposed to this view and is illustrated in the companion cases of *McClanhan v. Arizona Tax Commission*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The *Mescalero* case is directly on point with the case at bar in that it involved a tribal business enterprise located on trust land acquired under §465 of the Indian Reorganization Act off of the Tribe's reservation in New Mexico. The Tribe was held liable for the state gross receipts tax assessment of $26,000.00 and the Mescalero's assertion that federal law completely pre-empted the field was rejected. This Court held:

> At the outset, we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the state court is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land. Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worchester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1932), has given way to more individualized treatment of particular treaties and specific federal statutes,

> including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. (Citations omitted) The upshot has been the repeated statements of this Court to the effect that even on reservations, state law may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law (citations omitted).

It is clear from the pronouncements of this Court in these two leading cases which have greatly shaped the area of Indian law that the federal policy does not completely pre-empt state law and therefore the federal defense of pre-emption must be heard in State Court. It is important to note that these two watershed opinions were brought to the Supreme Court from the state court systems of Arizona and New Mexico. Evidently, the Supreme Court of New Mexico has jurisdiction to enforce its State tax laws upon the Mescalero Apache Tribe, which ruling was not disturbed by this Court.

The Tenth Circuit relied heavily on the authority of *Lambert Run Coal Co. v. Baltimore and Ohio RR. Co.*, 258 U.S. 377 (1922) for their opinion that the case should not be remanded. That case, however, is readily distiguishable from the present case because in *Lambert Run*, the plaintiffs state court action sought to enjoin an Order of the Interstate Commerce Commission which regulated the allocation of railcars operated by the defendant.

The Plaintiff's petition in state court concealed the true nature of the action but when the case was removed to federal court, it became apparent that a federal agency was involved and the action was properly removed to federal court based on the federal nature of the action. In the case at bar, nothing was concealed in the State's petition, there is no federal agency involved and the Federal Government takes no responsibility or partnership in the operation of the Tribe's motel business. The Tribe is not a part or subdivision of the Federal Government nor is it controlled thereby to any greater degree than a private business or association. This view is supported by the authority in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), where the Tribe's suit to assert a claim to real property was based on federal statutes and properly brought in federal court.

At 676, this Court held:

> Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully v. First National Bank*, 299 U.S. 109 (1936)

Just because an Indian Tribe is involved does not mean a federal question is the basis of the plaintiff's action. This Court found in *Oneida* that even an Indian Tribe must allege a federal question to sue in federal court. The status of an Indian tribe qua tribe is not enough, standing alone, to obtain federal jurisdiction. Merely because an Indian tribe maintains federal recognition or federally protected rights does not confer federal question jurisdiction because the State and all of its citizens are likewise protected by the federal government and this does not give those litigants the right to bring any claim to federal court.

Pursuant to this Court's opinion in *Caterpillar*, Congress has long since decided that federal defenses do not provide a basis for removal. Therefore, as a matter of federal law, this case should be remanded to the District Court of Murray County, State of Oklahoma. Nothing in the State's original petition in State Court would allow removal jurisdiction and it is plain error for the Tenth Circuit to rule that removal was proper in light of this Court's ruling in the above cited cases.

II. THE DECISION BELOW IMPROPERLY DISMISSED THE STATE'S CASE BASED ON TRIBAL SOVEREIGN IMMUNITY.

Under the authority of *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), requiring tribal businesses to collect state taxes, the Oklahoma Tax Commission sued to enforce the State's tax collection requirements against the Chickasaw Nation's motel business. After the Tenth Circuit affirmed removal jurisdiciton in the

federal court, it ruled that the State's claim was barred; holding that the Tribe enjoyed sovereign immunity from suit within its "territory". In its first opinion, 822 F.2d 951, printed in the pet. for cert. page A-9, the Appeals Court disposed of the issue by ruling "Although the sovereign immunity enjoyed by tribes is not absolute, we may infer state authority only where Congress has expressly provided that state laws shall apply," citing *McClanahan v. Arizona Tax Commission*, 411 U.S. at 171. The second opinion of the Tenth Circuit in this case at page A-1 in the pet. for cert., reaffirms this ruling.

The Tenth Circuit's misapplication of *McClanahan*, to this case becomes readily apparent at 411 U.S. 167-168 where this Court closely tailored the decision by explaining that *McClanahan* does not apply to situations involving Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government for example *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). At 411 U.S. 171, the Court again explains that the Indian sovereignty doctrine has not been rigidly applied in cases where Indians have left the reservations and become assimilated into the general community, for example *Oklahoma Tax Commission v. United States*.

In *Oklahoma Tax Commission v. United States*, this Court ruled the Indian citizens of Oklahoma were not exempt from a general non-discriminatory estate tax applying alike to all state citizens because of the assimilation of the Oklahoma Indians into the general community of the state as opposed to the status of reservation Indians elsewhere. The Court held at 319 U.S. 602:

> *Worchester v. Georgia*, 6 Pet. 515, held that a state might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status - a condition which has not existed for many years in the State of Oklahoma.

The Court stated on page 603 that the underlying principles on which the reservation cases are based do not fit the situation of the Oklahoma Indians. "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal automnomy as in *Worchester v. Georgia*, supra, and, unlike the Indians involved in *The Kansas Indians*, 5 Wall. 737, they are actually citizens of the

State with little to distiguish them from all other citizens."

One month after this Court rendered the decision in *Oklahoma Tax Commission v. United States*, the Tenth Circuit cited that case in its opinion in *United States v. Hester*, 137 F.2d 145 (10th Cir. 1943) and reached the same conclusion. The Tenth Circuit found at 147 that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of federal law. Indians residing in Oklahoma are citizens of the State and they are amenable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State. The Tenth Circuit also held that a necessary incident of the power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end.

The Supreme Court of the State of Oklahoma has more recently ruled on the extent of tribal sovereign immunity in the case of *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985). The State Supreme Court found that although some adherence to the immunity doctrine continues, the strict territorial approach applied earlier has largely given way to two other tests developed by the United States Supreme Court since 1959 for assessment of Indian Country's amenability to state law, namely infringement upon tribal self-government and pre-emption by federal action. After balancing the State's interests, the tribal stake in self-government and the federal policies and legislation, the State Supreme Court concluded that state residuary jurisdiction may be excersied to the extent that tribal activity in Indian Country takes on a form that necessarily affects non-Indians and Indians who are non-members of the self-governing tribal unit. The State Court ruled at 711 P.2d 91, 'Tribal sovereignty is not a bar to state jurisdiction, although states must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption."

A. *The reservation system and tribal sovereignty within that system has been disestablished in Oklahoma.*

The cases cited above demonstrate that the Indian Tribes in

Oklahoma have received much different treatment than reservation Tribes in other states. To understand why Oklahoma is singled out in these cases for special treatment in this area of the law involves an understanding of the unique history of the formation of this State and the resultant factual distinction of being an "assimilated" state as opposed to a "reservation" state. To begin the analysis, history instructs that during the early part of the nineteenth century, the Five Civilized Tribes who inhabitited the Southeastern part of the United States, which included the Chickasaw Nation, were removed to reservations set aside for their use in Indian Territory which later became the present State of Oklahoma. Due to their alignment with the Confederacy during the American Civil War, the Chickasaws were required to cede the Western part of their domain to the United States so that their last reservation was located in what is now Southeastern Oklahoma. The map of *Indian Lands and Related Facilities* as of 1971, compiled by the Bureau of Indian Affairs in cooperation with the U.S. Geological Survey, U.S. Department of Interior, identifies the former Chickasaw reservation in Oklahoma, and also shows that at one time, almost the entire state was an Indian reservation. However, in the years just prior to Statehood at the turn of the century, these reservations were disestablished.

As outlined by the Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), in the latter half of the nineteenth century, large sections of the western States and Territories were set aside for Indian reservations. Towards the end of the century, however, Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land. This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West. As a result of these combined pressures, Congress passed a series of surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement. To this end Congress enacted the General Allotment Act of 1887, 24 Stat. 388 (25 U.S.C. §331) under which many of the reservations belonging to the smaller tribes in Indian territory were allotted. However, the Chickasaws were excluded from the

provisions of this Act as were the other Civilized Tribes.

The case of *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. 1976) details some of the history of the Five Civilized Tribes in Indian Territory. At page 1121 the district court states that during the last quarter of the nineteenth century the number of white persons living in Indian Territory grew dramatically. Although white settlement was illegal, the federal government did nothing to stop it. One recurrent problem was the general absence of an adequate court system to deal with disputes. In this atmosphere, crime flurished and debts were unenforceable. Also, white settlers were not happy with their inability to exercise political control over the Territory to mold the environment to their liking. As the white population continually grew, so did the demand to abolish the reservations so that land could pass freely into white hands and the Territory could be politically reorganized into a state.

By 1890, when the Oklahoma Territory adjacent to the Indian Territory was opened and a territorial government created, the clamor for allotment had reached a new peak. All the federal agencies responsible for Indian Affairs were advising Congress of the need to change the current system.

The case of *Woodward v. DeGraffenried*, 238 U.S. 284 (1915) details the efforts of Congress to organize the Territories for Statehood. At 238 U.S. 295, this Court found that under the Act of March 3, 1893, known as the Dawes Commission Act, 27 Stat. 612, it was the declared policy of the Congress to seek the allotment of all reservations in Indian Territory. To this end Congress, at §16 of this same Act, created the Dawes Commission for the purpose of extinguishing the tribal titles, either by cession or allotment, with a view to the ulitmate creation of a state to embrace the lands within the territory. At page 296, n.1, the Court cites the annual reports of the Dawes Commission in its efforts to further the policy of Congress; efforts which the Court describes as beginning in discouragement, but finally crowned with success.

There were twelve reports filed by the Dawes Commission with Congress between the years 1894 and 1905. Although the Commission to the Five Civilized Tribes, as it was officially called,

was charged with negotiating the cession of land form the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, its broader mission was to restructure the government of Indian Territory with a view towards creation of a State for the Union. To this end the Commission concentrated its efforts on the Five Civilized Tribes because the smaller Tribes were effectively divested of their reservations under the Dawes Severalty Act of 1887, General Allotment Act, supra, which did not apply to the Five Tribes.

The reports of this Commission are improtant to this case because they give an accurate first-hand account of the conditions existing throughout the Indian Territory which greatly shaped the policies adopoted by Congress and form a basis to develop an understanding of Congressional intent with regard to disestablishment of all reservations in Oklahoma and the admission of Oklahoma as a State. These reports are so essential to the understanding of Congressional policy in pre-Statehood Oklahoma that they are reproduced in chronological order and are lodged with the Clerk for the convenience of the Court.

A preliminary report on the objective of the Dawes Commission filed by the Select Committee on the Five Civilized Tribes, relating the facts and conclusions of a fact finding mission to Indian Territory, was released in Senate Report No. 377, 53rd Congress, 2d Session, May 7, 1894. The Committee first quoted the report of the Committee on Indian Affairs submitted to the Senate July 26, 1892, which stated that when the treaties were made with the Five Civilized Tribes after the Civil War, it was the policy of the government to make an exclusive Indian Territory, to which should be removed other Indians, so that the whole Territory should become filled with Indian tribes alone. This policy included the idea of a Territorial Government in which all of the Tribes which might occupy Inidan Territory should have representation after the manner of other territorial governments. An article was inserted in each treaty made with the Five Tribes in 1866 by which they consented to become members of such territorial governments. The plan thus proposed was never carried into execution, in part because of reasons stated by the tribes in the Annual Report of Commission of Indian Affairs for 1865, pp. 306-351 that such a government could not work among them.

Due to the lack of a central territorial government the Select Committee described the plight of the inhabitants of Indian Territory. The Administration of law among the growing white population and the Indian citizens was materially hindered by the complex jurisdictional tangles and an insufficient law enforcement structure. There was no public education and the best land was monopolized for the personal profit of a few tribal leaders to the exclusion of the other tribal members.

These conditions led that Committee to conclude that that Indian Tribes had breached the trust that was plainly provided in the treaties to hold this vast estate in land for the equal benefit of all Indian citizens. "Whatever power Congress possessed over the Indians it still possesses; notwithstanding the several treaties may have stipulated that the Government would not exercise such power, and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes." The Committee then stated at page 12 of the report:

> It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government can not continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change can not be much longer delayed. The situation grows worse and will continue to grow worse. There can be no modifications of the system. It can not be reformed. It must be abandoned and a better one substituted. That it will be difficult to do your committee freely admit, but because it is a difficult task is no reason why Congress should not at the earliest possible moment address itself to this question.

The Committee ended its report stating that they did not want to suggest what action Congress should take because they preferred to wait and see whether the Dawes Commision could negotiate a change in the present very unsatisfactory condition of that country. "But if the Indians decline to treat with that commision and decline to consider any change in the present condition of their titles and government the United States must, without their aid and without waiting for their approval, settle this question of the character and condition of their land tenures and establish a government over whites and Indians of that Territory in accordance with the principles of our constitution and laws."

The *first report of the Dawes Commission* was submitted on November 20, 1894, House Ex. Doc., Part 5, 53rd Cong., 3rd Sess., Vol. 14, pp. lix-lxx. The Commission reported the extreme opposition they met from the powerful tribal leaders who controlled the land monoply. The Commission provided an example by relating a meeting with the Creek Tribe where the Commission addressed the citizens upon the subject of their mission. After the Commissioners' address, the Chief of the tribe addressed the people in the Creek language which was not translated for the commissioners. Afterward the commissioners were informed that the Chief stated to the tribe that if they acceded to the propositions of the Government and accepted allotment they would each receive a lot of land only 4 by 8 feet, and thereupon called for a vote of the people on the Commission's proposals which were soundly rejected.

The Commission then reported what they found in the Territory. Railroads threaded every section of the country and large twons had been established for the large non-Indian population that continually grew in the Territory at the invitation of the Tribe for the profit of the tribal leaders. The solicitude and isolation of the Indian was no longer possible. The executory provisions in the treaties had become impossible to execute because of the neglect on both sides to enforce them. Without regard to any observance of the treaty stipulations on their part, the Indians claimed that these treaties were irrevocbly binding on the United States. Furthermore, lawlessnes was widespread and the tribal governments became powerless to protect the life or property rights of its citizens. "A reign of terror exists," wrote the Commissioners, "and barbarous outrages, almost imposible of belief, are enacted, and the perpetrators hardly find it necessary to shun daily intercourse with their victims".

Also the Commission reported that corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. The report concluded that justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. The United States granted to these tribes the power of self-government, not to conflict with the Constitution. They have demonstrated their incapacity to so govern

themselves, and no higher duty can rest upon the government that granted this authority then to revoke it when it has so lamentably failed.

In the *second report* submitted November 14, 1895, House Doc. No. 5, 54th Congress, 1st Sess. Vol. 14, pp. lxxix-xcvii, the *third report*, November 18, 1896, House Doc. No. 5, 54th Cong., 2d Sess., pp. cl-clv, and the *fourth report*, October 11, 1897, House Doc. No. 5, 55th Congress 2d Sess. Vol. 12, pp. cxvii-cxl, the commissioners reiterated the findings of the *first report* with emphasis and specifically detailed the issue of misruled in the Territory. Also, the commission noted a growing desire within the general community of the Territory for a change in the tenure of tribal property and government through allotment in severalty. However, since allotment would prove the downfall of the present system, the wealthy and powerful tribal leaders who controlled the land-holding monoply were still opposed to it for obvious reasons.

Since the Tribes were still resisting change and the efforts of the Dawes Commission had accomplished little, the Congress enacted the Curtis Act, June 23, 1898, 30 Stat. 495, which gave more power to the Dawes Commission and limited the power of the tribal governments in order to speed the process of negotiation. The Curtis Act also provided for the allotment of the Chickasaw reservation to tribal members at 30 Stat. 505, Section 29, known as the Atoka Agreement.

The *fifth report of the Dawes Commission* submitted October 3, 1898, House Doc. No. 5, 55th Congress, 3d Sess. Vol. 15, pp. 1051-1090, the *sixth report*, submitted September 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess. Vol. 19 pp. 3-178, the *seventh report* submitted September 1, 1900, House Doc. No. 5, 56th Cong. 2d Sess. Vol. 28, pp. 5-79 and the *eighth report*, October 1, 1901, House Doc. No. 5, 57th Cong. 1st Sess., Vol. 24, pp. 5-221, discuss the effect of the Curtis Act on the Territory by the way the tribes were induced to enter into the agreements that would forever change their way of life and replace their tribal governments with a constitutional state government to rule all of the people in the territory by representation and provide the benefits of an ordered society that only a state can provide.

The prefatory to the eighth report contained the following statement:

> It could not have been contemplated by Congress that within the borders of the United States should be permitted to spring up independent republics, unanswerable to the General Government. Even had such a course been harmonious with our form of government, the inability of the tribes to restrain lawlessness and maintain stable governments, free from corruption, precluded the possibility of their continuance. While the aborigines were, by a long-established and high conception of right, independent of treaty considerations, entitled to the undistrubed possession of a domain of reasonable proportions, a higher law than that of the Congress destined them to extinction as a race and their absorption by a people whose government has now taken foremost rank among the nations of the world. While sympathy may well be felt for the American Indian, his passing is but one of the melancholy events which are so often followed by most fitting sequences.
>
> The ownership of land in common having proved, under modern conditions, a lamentable failure, and the Government having wearied of fruitless negotiations, Congress undertook, by the passage of the Curtis Act, approved June 28, 1898, to formally administer upon the estate of the Five Civilized Tribes, which, while vast in extent - almost as large as the State of Ohio - has not been deemed more than is needed under present conditions by the seventy-five or eighty thousand heirs in whom the title is vested. To allot them land upon any other principle than equality of value would remedy none of the evils arising from the unequal distribution of land which have so long existed; while to apply this principle, as the law provides, involved one of the largest, most intricate and difficult undertakings in which our Government has ever been engaged.

The statements made in the fifth through the eighth reports, which followed the enactment of the Curtis Act by Congress, indicate the belief of the Commission that the tribal government system would be disposed of and replaced by a constitutional state government that would be part of the federal system and would meet the needs of its people and fulfill the manifest destiny of the still energing nation for the benefit of all within its borders.

During the next year, the work of the Commission progressed rapidly and according to the *ninth report*, July 20, 1902, House Doc. No. 5, 57th Cong., 2d Sess. Vol. 18, pp. 180-217, the end of the project, started a decade before, was coming into view. In the *tenth report*, September 30, 1903, House Doc. No. 5, 58th Cong. 2d Sess., Vol. 20 pp. 1-109, the Commissioners reviewed the work of the Commission from its inception. The following excerpt contains the Commissioner's comments about the history of the Dawes Commission:

> The problem to be dealt with in this Territory developed upon Congress slowly. For the first five years - namely, from 1893, the year the Commission was created, until 1898 when the Curtis Act was passed - this body was clothed with only negotiating power, except a limited function under the act of June 10, 1896, relating to determination of citizenship rights.
>
> The object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard.
>
> It was evident at the end of the first five years that the accomplishment of the foregoing object by negotiation alone was practically impossible. The Indians (so called, for most of them by a century and a quarter of intermarriage have far more Saxon than Indian blood) would never surrender by consent what they did want to give up at all. The Commission, as then constituted was able to bring to the discussion neither inducements nor force. Some of the tribal members held passionately to their institutions from custom and patriotism, and others held with equal tenacity because of the advantages and privileges they enjoyed. It was almost worth a man's life at that time to advocate a change.
>
> Under these conditions Congress was in 1898 fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the Commission from merely a negotiating body into also an executive and semijudicial body, and of proceeding with the work under the constitutional

> power of Congress, and largely, at least, regardless of the will of the tribes.
>
> A strenuous effort was made to prevent the adoption of the latter course. So pronounced was the opposition and so sever were the criticisms heaped upon the Commission that at one time there seemed to be no doubt of success for those who favored this policy. But in what may be deemed a fortunate hour it was decided not to act without giving a chance to the special representatives of the Government to be heard, both in their own defense and with respect to what course should be adopted. This led to such a revelation of slander, corruption, and oppresion that Congress immediately passed the Curtis Act, and it has been followed by prompt appropriations for its execution, amounting now to nearly $1,000,000.
>
> That act undertook, not to let anybody and everybody come forward and take public land, but to administer upon five great estates, aggregating 20,000,000 acres. It ordered these estates to be partitioned among the individual heirs upon the principle of equal value; and it could hardly have done less, and at our expense, under the stipulations of treaties.

In the *eleventh report*, October 15, 1904, House Doc. No. 5, 58th Cong., 3d Sess., Vol. 20, pp. 1-198, and the *twelfth and final report*, June 30, 1905, House Doc. No. 5, 59th Cong., 1st Sess., Vol. 19, pp. 579-640, the Commissioners outlined the culmination of their work of preparing the rolls of citizens and allotment of all the land to make way for the creation of the State of Oklahoma. The Objectives of the Commission, the allotment of the land and the effacement of the tribal governments, were successfully obtained and the great effort of the Commission, spanning more than a decade, enabled the national government to create a State to be admitted to the Union for the benefit and protection of the Nation itself, as well as the citizens who resided there.

As was their stated intent, the Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional State government capable of admision into the Union on an equal footing with the original States. This culminated in the report filed by the Committee on the

Territories recommending Oklahoma statehood in the House of Representatives' Report No. 496, January 23, 1906, 59th Congress, 1st Sess. to accompany H.R. 12707, the Oklahoma Enabling Act, 34 Stat. 167.

In this report the Committee reveiwed the history of Indian Territory and the work of the Dawes Commission which enabled the Oklahoma and Indian Territories to be admitted as a single State. The Committee stated that it was the intendment of Congress by the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, that Oklahoma Territory should increase in geographical scope from time to time as the various reservations in Indian Territory were disestablished and attached to Oklahoma. The Committee stated at page 8 of the report:

> Construing the organic act of Oklahoma according to its obvious fritent, that all the lands within the original limits of the Indian Territory should eventually be merged into the Territory of Oklahoma and thereafter into a State, the question to be determined is whether the so-called Indian Territory is ready to be joined with Oklahoma in a State, whether it may be so joined equitably so far as the Indians of Indian Territory are concerned.
>
> The Indian territory is not an organized Territory, but is an area of land occupied by the Five Civilized Tribes, viz, the Creeks, Choctaws, Chickasaws, Cherokees and Semi-noles, and certain small tribes in the northeast corner of the Indian Territory who hold their lands by patent.

The question of whether Indian Territory was ready to be joined with Oklahoma in a State was answered by the Committee affirmatively. In order to be ready for statehood the Indian Territory had to meet two basic conditions, namely, disestablishment of the reservations by allotment, and abolishment of the tribal government system so that individual private land ownership would replace the communal title and the new State government would replace the former tribal governments. As to these conditions, the Committee found that the time for State government had arrived. See page 10 of the report.

The Conclusion of the Committee report is as follows:

> Inasmuch, then, as in the opinion of this committee, the Congress intended by the organic act of the Territory of Oklahoma, that all of the original Indian Territory, together with what is now Beaver County, should become one State; and
>
> Inasmuch as the present Territory of Oklahoma has for some time been qualified for statehood, which has been deferred until the Indian Territory should be ready to be joined therewith in statehood; and
>
> Inasmuch as conditions in the Indian Territory imperatively demand some better form of government than now exists there; and
>
> Inasmuch as Indian lands will be allotted in severalty before the time when statehood can go into effect as provided for in this bill, and for all the reasons set forth in this report, this Committee report in favor of the joinder of the Territory of Oklahoma and the Indian Territory in one State, such State to be known as the State of Oklahoma.

The foregoing reports form the authoritative Congressional history of the creation of the State of Oklahoma from the first-hand accounts of Congressmen and government officials who were there. It is from this beginning that the State Government assumed the jurisdiction over all citizens of the State with the concurrent plenary power to tax all property unless specifically restrained by federal law.

From the tenor of these legislative reports and the actions of Congress at the turn of the century, it is clear that the federal government was unpleased with the course of social evolution in the Indian Territory and Congress worked in earnest to effect a lasting change in the way these citizens would be governed. This was not a mere surplus land act but a comprehensive program by the Federal Government to politically reconstruct the Territory. The assimilation policy of Congress at this time was so strong that the enactments of Congress were in complete derogation of the treaties made with the several tribes. Congress had concluded that since the tribal governments had violated their duties under the treaties and the federal government made no effort to enforce the agreements on its part, the treaties had to be set aside in order to restore a constitutional government in the Territory. Of course, the more influential tribal leaders who profited from the reservation system mounted

opposition to the disestablishment of that system and pointed out that the treaties distinctly provide that the Indian lands would never be included within a state or territory. The fact that these reservations were eventually included within the State of Oklahoma, in spite of the treaties, only underscores more boldly the intent of Congress to dispose of all reservations in Oklahoma.

Of course the Indian tribes questioned Congress' ability to revoke treaty stipulations without their consent. However, this court put that question to rest in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), where the Court ruled at 23 S.Ct. 221:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

The Court held in that case that Congress had the power to abrogate the provisions of an Indian treaty unilaterally. But even before *Lone Wolf*, the Supreme Court had determined that the treaties with the tribes in Oklahoma must yeild to congressional enactments. In the *Cherokee Tobacco*, 11 Wall. 616, 20 L.Ed. 227 (1871) the Court ruled at page 229:

> A treaty may supersede a prior act of Congress *(Foster v. Neilson*, 2 Pet. 314), and an act of Congress may supersede a prior treaty. *Taylor v. Morton*, 2 Curt. 454; *The Clinton Bridge*, 1 Woolw. 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

The preceding argument paints a vivid picture of congressional intent to disestablish all reservations in Oklahoma. This intent and belief has carried forward to the present, and Congress has since recognized that no reservations survived past Statehood. The Senate report on the Oklahoma Indian Welfare Act, 25 U.S.C. §501 et. seq. S.Rep. No. 1232, 74th Congress 1st Sess., July 29, 1935, states:

> In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citzenship of the State.
>
> Under the Oklahoma constitution and our laws, all Indians are full citizens and enjoy all the right extended to white citizens. The Wheeler-Howard bill was evidently prepared having in view the large Indian reservations located in the western and southwestern States. The Oklahoma Indians having made progress beyond the reservation plan, it was thought best not to encourage a return to reservation life.
>
> Inasmuch as the Indians of Oklahoma present many and varied problems, special consideration has been given to such State and as the result of such study, Senate bill 2047 was prepared and is now pending before the Congress for consideration.[1]

The view held by Congress that no reservations remain in Oklahoma is also shared by the executive branch. The U.S. Department of Commerce published a handbook outlining various aspects of many of the Indian tribes in the United States entitled *Federal and State Indian Reservations and Indian Trust Areas (1973)*, cited in the pet. for cert. in footnote 2, page 12.

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[1] The Wheeler-Howard bill was enacted as the Indian Reorganization Act, 25 U.S.C. §461 et seq. The tribes in Oklahoma were excluded from the application of this Act at 25 U.S.C. §473.

The D.O.C. commented in the description of the Chickasaw Tribe that "This tribe has commingled both culturally and economically with the non-Inidan society to a greater degree than many other Oklahoma tribes." The comments on the Oklahoma tribes in this book express the assimilation and lack of autonomy of these tribes.

All of these opinions expressed in Supreme Court decisions, congressional reports, and federal publications, coupled with the surrounding circumstances which prompted Congress to adopt the policy of allotment and assimilation of the several reservations in Indian Territory all point to the conclusion that the tract of land in question here, or any tract of land in Oklahoma, is not a reservation.

This Court has held in *Solem v. Bartlett*, supra, that explicit language of cession and unconditional compensation are not prerequisites for a finding that a reservation has been disestablished. The Court also looks to surrounding circumstances, the tenor of legislative reports presented to Congress, and events that happended after the passage of the Act as well as Congress' own treatment of the affected area in the following years to decipher Congress' intentions. Where non-Indians settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court acknowledges *de facto*, if no *de jure*, diminishment, *Solem* at 465 U.S. 471, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). When the factors set out in these three cases are applied in the context of the case at bar, it is clear that reservations no longer exist in Oklahoma.

To return to the present case, the proposition that there are no reservations in Oklahoma brings this case squarely within the fact pattern of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In that case Mescalero Apache Tribe acquired a tract of land from the United States Forest Service upon which they developed and operated a ski resort. This land was contiguous to the Tribe's reservation in New Mexico. In note 11 of the *Mescalero* opinion, this Court explained that the arrangement by which the Tribe acquired the land from the United States brings the Tribe's interest in the land within the tax immunity afforded by 25 U.S.C. §465 in the Indian Reorganization Act. The tax immunity in §465 exempted the land

from ad valorem taxes and the Supreme Court held that this immunity from tax extends to the compensating use tax assessed against the permanent improvements installed on the land to constuct the ski resort.

The facts in *Mescalero* are comparable to the facts in the case at bar. The Chickasaws acquired the land from the United States, which land was transferred in trust for the tribe under 25 U.S.C. §501 and §465. Therefore, in both cases the Tribe acquired non-Indian land from the Federal Government which was transferred in trust for the Tribe. In both cases, the Tribes developed a business enterprise on their land, open to the general public, in competition with similar private businesses in the same community. Although the land acquired under §465 or §501 is not subject to ad valorem taxes, the tax immunity under these statutes does not extend to income or sales generated from the use of the land.

When confronted with these facts in the *Mescalero* case, the Supreme Court began its discussion of the opinion by rejecting the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land. The Court determines the various rights of the State, Tribe, and Nation by entering an individualized examination of particular treaties and federal statutes as they affect the various institutions. The upshot has been the repeated statements by the Supreme Court that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. However, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, the State has no authority to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation under the ruling in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). The Supreme Court stated at 411 U.S. 148:

> But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake v. Egan*, 369 U.S. 60, (1962). Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

The *Mescalero* case clearly demonstrates that land acquired in trust for the Tribe under §465, outside of an Indian reservation, does not create Indian country status. Indian country cannot be created by the operation of the statute which merely authorizes the acquisition of land in trust, rather, the status must be conferred by Congress and specifically proclaimed; an action which Congress did not take in the Mescalero case nor in the case at bar.

After dismissing the Mescalero's claims of tax exemption under the intergovernmental immunity doctrine, the Court turned its analysis to the scope of the immunity afforded by §465. Section 465 states that "such lands or rights shall be exempt from State and local taxation," while Section 501 provides "said lands shall be free from any and all taxes" (Except State gross production tax). The language of the two statutes are similar and have a like effect. The Supreme Court found that on its face, §465 exempts land from taxation but not income derived from its use. The interpretation of §501 can only be synonymous with the interpretation of §465. Absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

The Appeals Court below has effectively foreclosed the application of *Mescalero* by its cryptic ruling that an Indian Tribe enjoys sovereign immunity from suit within its territory. Thus, the Tenth Circuit has created in the Tribe a sovereign super-entity which can sue and not be sued, make law and be subject to no law, and exercise unknown rights while at the same time ignore the existing rights of others. The ramification of this position is far reaching in that the Tribe will be free of any state law and unanswerable for any damage it causes to employees, other businesses with which it deals,

and the general public that comes in contact with it. But the State would submit that the Tribe is answerable to state law, even within Indian Country in Oklahoma, because of the inherent difference between an assimilated state such as Oklahoma and the traditional reservation states.

B. *State law is applicable within Indian Country in Oklahoma.*

The difference between Oklahoma and the reservation states is that in these other states the reservation boundaries clearly delineate between state and federal or tribal jurisdiction in a specific and contiguous land area. In Oklahoma, no reservation boundaries exist and the only type of Indian Country remaining is Indian allotments which are scattered randomly throughout most of Oklahoma within the former reservation areas and Indian trust lands under §465. These allotments vary in size from just a few acres to the standard 160 acre allotment.

The isolation of small tracts of Indian Country in Oklahoma was not the situation which presented itself in the reservation cases. In *Seymour v. Superintendent*, 368 U.S. 351, (1962), the Court faced the question of whether the State of Washington had jurisdiction to prosecute an Indian for n offense committed on a tract of land in the Colville Reservation which was owned in fee by a non-Indian. The Court held that the entire block of land within the reservation borders was Indian Country under 18 U.S.C. §1151 regardless of how the land was held. The Court ruled at 368 U.S. 358:

> Where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of §1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Court faced a similar question concerning whether state law applied to Allotments within the Flathead Reservation in Montana. The Court cited the *Seymour* case for its holding at 425 U.S. 478 that "Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area."

The effect of the decisions in *Seymour* and *Moe* was to consolidate the jurisdiction within the contiguous area of an Indian reservation in the federal government, regardless of how the title to land was held, in order to ease the administration of law. This made sense under the federal statutes in Title 18, U.S.C. because it would be impractical for law enforcement authorities to scrutinize tract record books in the county clerk's office before they answered a call or investigated a crime. Also the trial of simple offenses could be protracted by the necessity of proving up land titles.

However, in *Decoteau v. District Court*, supra, the Court acknowledges in note 3 at 420 U.S. 429 that this sensible approach to §1151 on the reservation might be awkward in other contexts. The Court stated, "We note, however, that §1151(c) contemplates that isolated tracts of "Indian Country" may be scattered checkerboard fashion over a territory otherwise under state jurisdiction. In such a situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory. How these conflicts should be resolved is not before us." Also, the Supreme Court again noticed this problem in *Solem v. Bartlett*, supra, in note 12 where it was said, "When an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian Country seriously burdens the administration of State and local governments." These cases dealt with reservations and did not present the problem of isolated Indian allotments, but this language does indicate that a different result may be warranted in such a case. As discussed above, the Supreme Court has treated Oklahoma differently in *Oklahoma Tax Commission v. United States*, where the State's tax collection efforts were enforced because of the lack of tribal autonomy in Oklahoma.

Insofar as §1151 operates directly to displace the State's ability to administer its tax laws evenly upon all citizens, it is not within the authority granted Congress by the Commerce Clause. Indian Allotments or Indian trust land in Oklahoma are not federal land areas such as Indian reservations. A reservation, as we have seen, can be disestablished, divided up, and sold off by the federal government. An Indian allotment, or trust land, like any privately owned piece of land, cannot be taken from its owner without due process. So this case does not deal with federally owned land but privately owned land. In attempting to exercise its Commerce Clause power to pre-empt the application of state tax laws upon business activities within the State on privately held land, Congress has sought to wield its power in a fashion that would impair the State's ability to function effectively in a federal system.

Under the Supreme Court's ruling in *National League of Cities v. Usery*, 426 U.S. 833 (9176), Congress may not regulate commerce so as to force directly upon the States its choices as to how essential decisions reagrding the conduct of integral governmental fucntions are to be made, especially in cases such as this which do not involve interstate commerce or federal land areas.

The State notes that *Usery* was overruled by this Court in *Garcia v. San Antjonio Metro.*, 469 U.S. 528 (1985) which ruled contra to *Usery* that the federal Fair Labor Standards Act does apply to State and local employees. However, the State does not cite *Usery* for the holding in that case concerning the State's immunity from the FLSA. Rather, the State cites *Usery* for the proposition that, under the principles of federalism embodied in the Constitution and the States' rights for separate and idependent existence protected by the Tenth Amendment, there are limits on the Federal Government's power under the Commerce Clause to interfere with or impair the State's integrity or its ability to function in a federal system; a proposition which was recognized in the *Garcia* opinion for its continued validity.

Obviously, the 1948 amendments to the Major Crimes Act in the United States Code which codified Indian Country for purposes of federal criminal jurisdiction did not have in mind the situation of the allotments in Oklahoma in the context of civil taxing jurisdiction within the State. While §1151 is concerned, on its face, only with

criminal jurisdiction, the Supreme Court has recognized that it generally applies as well to questions of civil jurisdiction. As applied to reservation states, §1151 works to eliminate the vexing problems of "checkerboard jurisdiction" which is desirable for many cogent reasons. however, this reasoning falls apart when applied to Oklahoma where §1151 creates the checkerboard jurisidiction that it was intended to resolve. The Supreme Court has recognized that the application of §1151(c) to such a situation would "seriously burden the administration of State and local governments," see *Solem*, n. 12.

To the extent that §1151 seriously burdens the adminsitration of State government in Oklahoma, it is an unconstitutional exercise of Congressional power. Before the enactment of §1151 in 1948, the Supreme Court ruled in *Oklahoma Tax Commission v. United States*, supra (1943), that the federal statutes granting limited property restrictions and exemption from ad valorem taxes does not imply an expansive immunity from all general non-discriminatory state taxes. "Wardship with limited power over his property did not there without more, render the Indian immune form the common burden."

Unquestionably, before the enactment of §1151, Oklahoma had the plenary power to tax all property within its domain unless *specifically* restrained by federal law. This was the intent and effect of the Statehood legislation and the work of the Dawes Commission which dethroned the tribal governments within the reservation system and replaced them with a constitutional state government. Since that time, as far as the operation of §1151 intrudes on the necessary functioning of intrastate affairs, it has unconstitutionally impaired the sovereignty of this State by curtailing the State's recognized power to tax its citizens. Although Congress has granted specific tax immunity to Indian allotments from state ad valorem taxes, the general implication of immunity provided by §1151 by extending the statute beyond its face to civil jurisdiction, is an unconstitutional construction as applied to Oklahoma. Likewise, the enactment of PL 83-280, 28 U.S.C. §1360, in 1953 did nothing to hinder the existing jurisdiction of this State as the Tribe would suggest. This Court has ruled in *California v. Cabazon Band of Mission Inidans*, 107 S. Ct. 1083 (1987) at 1088, that Congress' primary concern in enacting P.L. 280 was combating lawlessness on

reservations. This specific problem was solved in Oklahoma by the Dawes Commission when all reservations were disestablished prior to Statehood. But even still, P.L. 280 is not a bar to State taxation and is not a license for the Tribe to make untaxed goods and services available to the general public in violation of State law. It could not have been the intendment of P.L. 280 that it should be used to aid the State's citizenry in such wholesale evasion of tax law.

It does not matter whether the allotment or trust land is owned by a tribe or an individual Indian because the State has plenary power to tax all property. The prospect that a state may tax or regulate a tribe is not new, see *Mescalero Apache Tribe v. Jones*, supra, *Organized Village of Kake v. Egan*, supra. It must be remembered that there is a fundamental difference between a state and a tribe. The state is an indestructible component of the government of this country. The Tribe has no part in the government of this country and is subject to complete defeasance.

The Constitution vests the Federal Governmen with exclusive authority over relations with Indian tribes, Art. I §8 cl.3, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, (1985). In *National League of Cities v. Usery*, the Supreme Court stated that "It is beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress." That authority is, in the words of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1894), "The power to regulate; that is to prescribe the rule by which commerce is to be governed."

However, the Court in *Usery* found that there is room for state's rights to co-exist within federalism. At 426 U.S. 842, the Court ruled:

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. In [*Maryland v. Wirts*, 392 U.S. 183 (1968)], for example, the Court took care to assure the appellants that it had ample power to prevent . . . the utter destruction of the State as a sovereign political entity, which they feared.

The Court recognized that an express declaration of this limitation is found in the Tenth Amendment: While the Tenth Amendment has been characterized as a "truism," stating merely that all is retained which has not been surrendered, it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or its ability to function effectively in a federal system.

In contrast to the limitations placed on Congress in respect of a state's sovereignty, the sovereignty of a tribe exists only at the sufferance of Congress and subject to complete defeasance, *Rice v. Rehner*, 473 U.S. 713 (1983). No immunity from legislative invasion can be claimed for Indian tribes and the consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance, *The Cherokee Tobacco*, 11 Wall. 616, 20 L.Ed. 227 (1871). Rather than Tenth Amendment protections, Indian tribes are merely protected by federal policy derived from the Constitution which has vascilalted from autonomy to assimilation and from termination to self-determination. But whatever the federal policy has in store for Indian tribes now and in the future, this policy is purely a function of the Federal Government, and the power to implement any federal policy is limited to the extent that policy might operate to excessively infringe on the states' rights in violation of the Tenth Amendment.

In many articles of the Constitution, the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized, *Usery*, citing *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101 (1869). In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, (1926) the Court likewise observed that "neither government may destory the other not curtail in any substantial manner the exercise of its powers." The Court in *Usery* added that "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits its from exercising the authority in that manner."

In this case, the State's ability to levy taxes on its citizens for the support of the government can be nothing but a function essential to separate and independent existence. This State's plenary power to lay and collect taxes was recognized by this Court in 1943. Under the holding in *Usery* and *Garcia*, such plenary authority may not be abrogated by Congress. Inasmuch as the 1948 amendment to the Major Crimes Act trammells the existing power of Oklahoma to lay and collect taxes, the amendment is unconstitutional as it is so applied. Moreover, why should the State carry the burden of the federal policy in this regard. There is no reason why the government of the State should be prevented from taxing its own citizens upon transactions occurring on non-public lands, within the State, and outside the boundaries of any reservation or federal land area, by way of federal law.

Taxes are indispensable to the support of State Government because the State does not operate convenience stores, smokeshops or bingo halls to raise revenue. The State pays for government through taxation of its citizens. The Constitution not only provides, but requires, the states to maintain and support their own government. When the Federal Government attempts to restructure state taxation schemes, as is the result obtained by the lower court in liberating the Tribe from State law, that Government has exceeded its enumerated powers.

At one time intergovernmental tax immunity was once much in vogue in a variety of contexts stemming from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). This position changed in more recent years as evidenced by Justice Holme's famous dissent in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 at 223 (1928), which was later vindicated by the opinion in *Alabama v. King Boozer*, 314 U.S. 1 (1941). Justice Holmes remarked:

> It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the

> States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destory while this Court sits.
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> To come down more closely to the question before us, when the government comes into a State to purchase I do no perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal.

One reason that the intergovernmental immunity doctrine failed is that taxes are indispensable to the maintenance of a government and within our federal system, the tax base of the various governments could be undermined by the doctrine. Also, the doctrine was used by persons who were properly taxable to evade those taxes. Curiously, the Federal Government was experiencing the same difficulties that Oklahoma is facing today in collecting a tobacco tax over one hundred years ago. In *The Cherokee Tobacco*, 11 Wall. 616 (1871), the United States was attempting to enforce is tobacco tax laws against members of the Cherokee Tribe in Indian Territory. This Court held that the Indians were liable for the tax holding:

> The 107th section of the act of 1868 extends the revenue laws only as to liquors and tobacco over the country in question. Nowhere would frauds to an enormous extent as to these articles be more likely to be perpetrated if this provision were withdrawn. Crowds, it is believed, would be lured thither by the prospect of illicit gain.
>
> This consideration, doubtless and great weight with those by whom the law was framed. The language of the section is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed.

Under the Appeals Court's ruling in this case, Oklahoma is similarly faced with the prospect of seeing millions of dollars worth of goods being sold to the general public on 'Indian land" without the power to enforce tax collection.

Besides tax evasion, another practical problem facing the State rests in the inherent psychology of taxation in that, when an exemption from tax is granted, the tax payers then try to bring themselves within the exemption by disguise in form or a substantive change in their business. For example, if the government of a country decides to impose a tax upon all horses except white horses, the country will be instantly filled with nothing but white horses. By analogy, in Oklahoma, the State is witnessing businesses who tie themselves to the government of the tribe and produce substantial amounts of untaxed sales in this State under the erstwhile Indian exemption. The Federal Government was faced with a similar problem in *New York v. United States*, 326 U.S. 572 (1946), in which New York purchased the Saratoga Springs in order to conserve the natural resources of the springs. The State bottled the spring water, commercially marketed it and claimed inter-governmental immunity from the federal soft drink tax. Seeing that this immunity was undermining the tax base of the soft drink tax laws, the Federal Government challenged the immunity which was struck down by this Court.

The Court held that Congress may not lay taxes, for instance, upon a Statehouse or a State's tax revenues because these could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taxes a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. Congress may exempt states while taxing private enterprises, however:

> If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy."

Likewise, the Chickasaw Nation may carry out its own notion of social policy or self-government in engaging in the motel business, but it must pay its share in having a nation, a state and a federal system which enables the Tribe to pursue its policy. State taxation of the tribal business does not infringe on the self-government of the Tribe. New York apparently overcame its loss of immunity from the soft drink tax without ill effect.

Although the Tribe can point to treaty provisions which describe greater immunities than the Tribe enjoys today, those laws did not remain static throughout the course of history. The statesmanship practiced by the Dawes Commission dismantled those immunities in order to put the last piece of the continental United States in place. Whether or not these decisions were unfair does not negate the fact that laws respecting the tribes in Oklahoma were changed. That laws will change is an essential nature of government. "The science of government is the most abstruse of all sciences, if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment," *New York v. United States*, citing *Anderson v. Dunn*, 6 Wheat 204, 226.

The Federal Government created the State of Oklahoma and did not exempt the Tribes living there from the laws of this State. The immunities of this Tribe have been swept away and if the Tribe maintains any attribute of sovereignty, it is sovereign only unto itself. There remains but one sovereign nation within Oklahoma, that being the United States of America. It is, for these reasons, error, to dismiss the action of the State aginst the Tribe.

CONCLUSION

The Oklahoma Tax Commission respectfully requests that this Court reverse the opinion of The Tenth Circuit Court of Appeals which affirmed removal jurisdiction in federal Court on the basis of the affirmative defense of Tribal sovereign immunity cast as an inherent federal question in the original pleading. Based on this Court's ruling in *Catepillar v. Williams*, supra, that a federal defense does not provide a basis for federal question jurisdiction, the case should properly be remanded to the District Court of Murray County, State of Oklahoma.

The State further requests that the ruling of the Appeals Court dismissing the State's claim should also be reversed based on this Court's opinion in *Oklahoma Tax Commission v. United States*, and *Mescalero Apache Tribe v. Jones*, supra, that Oklahoma has plenary power to tax all property within the State save being specfically restrained by federal law and Indians going beyond reservation boundaries are subject to all nondiscriminatory state laws applicable to all other citizens. Also, principles of federalism embodied in the Tenth Amendment to the Constitution protect the State from invasions of federal law which would impair the State's integrity or its ability to function in a federal system. Therefore, the suit immunity of the Tribe based on Federal law should be struck down.

Respectfully submitted,

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